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NOTES

Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause

Christopher K. Dalrymple*

Introduction

Throughout the twentieth century, various international organizations attempted to spur and increase foreign direct investment in less-developed

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1. This Note will concentrate on foreign direct investment, the type of international equity investment by an alien in a foreign country that is most implicated by the Calvo Doctrine. There are other means of investing, however. These other types of investment include: various bilateral aid programs and project loans, the loans of international development lending institutions, i.e., the World Bank and the Inter-American Development Bank, loans from banking consortia, direct loans from foreign banks, etc. See generally Charles Oman, New Forms of International Investment in Developing Countries (1984). However, after the recent peso crisis in Mexico, these types of investing may be scaled back, making foreign direct investment (FDI) even more critical to the development of Latin America. David L. Aaron, After GATT, U.S. Pushes Direct Investment, Wall St. J., Feb. 2, 1995, at A18.

One claimed advantage of FDI is that it is not a debt instrument requiring regular debt-service payments (payments which can affect a developing country's balance of payments). Only when a foreign investor's business earns a profit will any payments by a developing country be involved. Ibrahim F.I. Shihata, Factors Influencing the Flow of Foreign Investment and The Relevance of the Multilateral Investment Guarantee Scheme, 21 Int'l L.J. 671, 675 (1987). Thus, part of the risk of the investment is transferred from the developing country and onto the foreign investor. Id.

Indirect advantages of FDI include:

[that] direct investment does not simply provide funds, but an integrated package of financial resources, managerial skills, technical knowledge, and marketing connections. . . . Other indirect but important attributes of this form of capital relate to benefits that ensue from the introduction of efficient and internationally competitive enterprises into the local economy.

Id. Finally, FDI is "also substantially involved with import substituting and export industries, so the foreign trade performance of enterprises based on direct investment can have a significant effect on [a developing country's] balance of payments." Klaus P. 29 Cornell Int'l L.J. 161 (1996)
countries through an investment guarantee agency.2 Despite these efforts, no international investment guarantee agency existed until 1986, when the World Bank created an investment insurance program known as the Multilateral Investment Guarantee Agency (MIGA).3 Its creators envisioned encouraging the flow of foreign direct investment (FDI) to and among developing countries by issuing guarantees against non-commercial risks present in these types of transactions.4

Latin American countries were among the intended beneficiaries of this new agency.5 During the 1980s, less-developed countries, particularly Latin American ones, experienced a dramatic decrease in the amount of non-direct foreign investment, i.e., foreign loans, made available to them.6 At the same time, Latin American countries' need for foreign direct invest-


Because of these advantages, many Latin American countries with large debt obligations turned their focus from commercial loans back to FDI. The Latin American debt crisis in particular was responsible for a drastic reduction in net voluntary commercial bank lending to less-developed countries. Stijn Claessens, Alternative Forms of External Finance 1 (World Bank Working Paper No. 812, 1991). Further, when global FDI flows began increasing in the late 1980s, the percentage of foreign direct investment flowing to developing countries, including Latin American ones, fell. Recent Trends in FDI for the Developing World, FIN. & DEV., MAR. 1992, at 50.

2. See generally Theodore Meron, Investment Insurance in International Law 30-37 (1976). See also J. Voss, The Protection and Promotion of Private Investment in Developing Countries—An Approach Towards a Concept for a European Policy on Foreign Investment, 18 COMMON Mkt. L. REV. 363 (1981). Efforts to establish some type of multilateral investment guarantee agency began in the 1950s. Ibrahim F.I. Shihata, The Multilateral Investment Guarantee Agency, 20 INT'L LAW. 485, 485 (1986). Organizations such as the World Bank, the Organization for Economic Cooperation and Development, the Inter-American Development Bank, the United Nations Conference on Trade and Development, and the European Community participated in these efforts and discussions. Id. At the time, none of the efforts or discussions led to the creation of such a multilateral investment guarantee agency. Id.

3. Convention Establishing the Multilateral Investment Guarantee Agency, opened for signature Oct. 11, 1985, 24 I.L.M. 1598 (entered into force April 12, 1988) [hereinafter MIGA Convention]. The World Bank was established at the Bretton Woods Conference in 1944 to help fund reconstruction in Europe after World War II. Today, the Bank's primary function is to finance investments for development in its member nations. This function specifically includes the promotion of development in Third World and other less-developed countries. Articles of Agreement of the International Bank for Reconstruction and Development art. I. (1945).


5. Id. at 19. "Latin American," as used herein, refers only to those nations with an Iberian background, namely, Mexico, the five Central American Republics, Panama, the Dominican Republic, Cuba, and the ten South American States. When this Note intends to limit the discussion to a certain subset of the above listed countries, it will clearly signify this limitation to the reader.

6. Foreign Private Investment in Developing Countries 3, 3-4 (Int'l Monetary Fund, Occasional Paper No. 33, 1985). For a general discussion of the macroeconomic factors affecting the flow of foreign direct investment, see Shihata, supra note 1, at 671. See also Malcolm D. Rowat, Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA, 33 HARV. INT'L L.J. 103, 103-04 (1992) for a discussion on how the investment climate of the 1980s affected Latin American countries in particular.
ment grew in inverse proportion to the decline in available dollars.\textsuperscript{7} Thus, the benefits of an investment insurance agency would seem to be particularly attractive to these countries. However, while most Latin American countries are eager to attract FDI flows, for many years they have been reluctant to enter into any type of international investment agreement.\textsuperscript{8}

Some commentators believe the main cause of this reluctance is the continued use of "Calvo clauses" in Latin American contracts and constitutions.\textsuperscript{9} These clauses are named for the doctrine formulated by the Argentinian jurist Carlos Calvo in the mid-1800s in response to European diplomatic intervention in Latin America.\textsuperscript{10} The doctrine's two basic principles are: (1) the "national treatment standard," which provides that foreigners should not be granted more rights and privileges than those accorded nationals; and (2) the "diplomatic intervention" provision that foreign states may not enforce their citizens' private claims by violating the territorial sovereignty of host states either through diplomatic or forceful intervention.\textsuperscript{11}

Thus, for an agency like MIGA to be successful in Latin America, it must overcome the Calvo principles contained in certain countries' constitutions and statutes. MIGA's proponents, however, claim that Calvo Doctrine principles are "overvalued," if not irrelevant, in the context of modern international law.\textsuperscript{12} They also believe that even if Calvo principles are still relevant, the World Bank has designed an agency that can coexist with these principles so that Latin American countries can still become signatories of the MIGA Charter.\textsuperscript{13}

Part I of this Note discusses the history of the Calvo Doctrine in Latin America. Focusing on the Latin American countries that are members of the Andean Common Market (ANCOM), Part II shows the influence of Calvo Doctrine principles on certain ANCOM Decisions. Part III of this Note discusses the general terms and provisions of the Multilateral Investment Guarantee Agency. Part IV examines how the Calvo Doctrine is embodied in, and used by, a wide variety of contemporary legal theories, instruments, and laws. Finally, Part V shows that even if MIGA is successful in attracting Latin American nations as signatories, Calvo Doctrine principles in the MIGA Convention and Latin American laws may prevent MIGA from attaining its goal of increasing the flow of foreign direct investment to Latin America.

\textsuperscript{7} Shihata, \textit{supra} note 1, at 672-73.
\textsuperscript{9} \textit{Id.}
\textsuperscript{10} DANIEL SHEA, \textit{THE CALVO CLAUSE} 16 (1955). For a brief biography of Carlos Calvo, see Percy Bordwell, \textit{Calvo and the "Calvo Doctrine,"} 18 \textit{GREEN BAG} 381 (1906).
\textsuperscript{11} Shea, \textit{supra} note 10, at 19.
\textsuperscript{12} Shihata, \textit{supra} note 4, at 3.
\textsuperscript{13} \textit{Id.} at 24-25.
I. The Calvo Clause

A. Historical Overview

In the early 1800s, Latin American nations who had recently achieved independence from the colonial powers eagerly sought foreign investment. Shielding their local economies from foreign penetration was of secondary concern. To encourage investment by foreigners, these countries' new constitutions promised foreigners equality of treatment with nationals, which was surprising in light of the lingering political hostility towards many European nations and the United States. The effort by these countries to attract foreign investment was initially a great success.

By 1833, however, every Latin American bond issue was in default, and most of the foreign companies established to conduct business in the area had collapsed. In the following years, foreigners as well as nationals were exposed to economic losses. The inability of Latin American governments and judicial institutions to protect foreigners' property led many foreigners to appeal to their governments for relief either through diplomatic intervention or the use of armed force. Diplomatic protection eventually became an institutionalized legal technique justified by appeals to treaties, state practice, and legal commentators.

These requests for relief did not fall upon deaf ears in the foreigners' home states, and the instances of diplomatic intervention were wide-
spread. One of the most notorious examples was known as the "Jecker claim." J.B. Jecker and Company, a Swiss-French bank, arranged a loan to the Mexican government of up to 75,000,000 francs. Although Mexico borrowed only 3,750,000 francs, it went into default on this entire amount. Ostensibly in response to this default, France's Napoleon III invaded Mexico, where he maintained a puppet emperor until 1867.

B. The Formulation and Principles of the Calvo Doctrine

In response to these and other instances of diplomatic intervention, Carlos Calvo formulated what has come to be known as the Calvo Doctrine. As contained in Calvo's publications and correspondence between 1868 and 1896, the Calvo Doctrine advocated that: (1) sovereign states, being internationally equal and independent, enjoy the right to absolute freedom from interference by other states, either through force or diplomacy; and (2) while aliens should be given equal treatment with nationals, they are not entitled to "extra" rights and privileges and thus may only seek redress in local courts. This second tenet meant that foreigners could not appeal to the extent of the initial damages suffered.

23. Id. at 12. Diplomatic intervention had its origin in the following context: Nationals often felt entitled to complete security of their persons and property, and appealed to their governments on rather flimsy evidence and without any real effort to obtain local redress. The petitioned government, acting on limited, one-sided evidence, and often under domestic political pressure, sponsored claims that frequently were not based upon strict justice. Utilization of armed forces to compel the weaker nations to honor these dubious claims was not infrequent, and it sometimes happened that the severity of the measures adopted in seeking compensation for the alleged injuries was far out of proportion to the extent of the initial damages suffered. Id.

24. Id. at 14.

25. Id.

26. Id.

27. SHEA, supra note 10, at 17-19. The Doctrine was not articulated by Calvo in any one specific work. Rather, it was arrived at through an amalgamation of his writings and correspondence. Id. at 17.

28. Id. See generally FRANK DAWSON & IVAN HEAD, INTERNATIONAL LAW, NATIONAL TRIBUNALS AND THE RIGHTS OF ALIENS (1971). Dawson and Head argue that this assumption of the independence and equality of states is critical to the Calvo conception of diplomacy. Id. at 26.

29. Edwin Borchard, The "Minimum Standards" of the Treatment of Aliens, 38 Mich. L. Rev. 445, 447, 450 (1940). This equality of treatment standard is still favored today by most Latin American countries. See Ewell E. Murphy, The Andean Decisions on Foreign Investment: An International Matrix of National Law, 24 Int'l. Law. 643, 649 (1990). The responses of many industrialized countries has made it clear that they expect national treatment to remain within the boundaries of an international minimum standard. Borchard, supra, at 451-52. Borchard furthermore asserted that: [t]he doctrine of absolute equality—more theoretical than actual—is ... incompatible with the supremacy of international law. The fact is that no state grants absolute equality or is bound to grant it. It may even discriminate between aliens, [and] nationals of different states ... . While states naturally desire a free hand in dealing with all their inhabitants and while it is probably embarrassing to be restrained by treaty or international law in perpetrating excesses, this is one of the conditions of international intercourse. Id. at 452.

to their states for diplomatic intervention except in the event of a denial of justice.\textsuperscript{31}

Calvo further believed that recognizing the independent international law concept would result in “an exorbitant and fatal privilege, especially favorable to the powerful states and injurious to weaker nations, by establishing an unjustifiable inequality between nationals and foreigners.”\textsuperscript{32} Calvo argued that European nations applied a double standard of international morality and responsibility.\textsuperscript{33} He believed that these countries only intervened in each other’s affairs when some important principle was at stake.\textsuperscript{34} In their relations with Latin America, however, Calvo felt that the intervention of European states did not rest on any legitimate principles, but rather upon pretexts.\textsuperscript{35}

\section*{C. The Calvo Doctrine in Practice}

\subsection*{1. Overview}

Most Latin American nations responded to the formulation of the Calvo Doctrine and its principles with great enthusiasm.\textsuperscript{36} Although attempts to include principles of the doctrine in treaties with European nations were not initially successful, the concepts were incorporated into agreements among Latin American states.\textsuperscript{37} Many states included Calvo clauses in their constitutions and in contracts with foreigners.\textsuperscript{38} Nevertheless, investors who insisted on diplomatic intervention challenged the validity of these Calvo clause provisions.\textsuperscript{39}

Furthermore, while Calvo clauses in some instances did allow a foreign investor to seek diplomatic protection in the event of a “denial of justice,” most Latin American countries defined “denial of justice” quite

\begin{itemize}
\item \textsuperscript{31} CARLOS CALVO, LE DROIT INTERNATIONAL 231 (5th ed. 1870). See also Bordwell, supra note 10, at 377 (agreeing with Calvo that it would be improper for an aggrieved alien to bypass the local legal system and request diplomatic intervention where the laws of the host State did not “conflict with the law of nations.”)

This Note does not define “denial of justice” because the actions or behavior the phrase encompasses have never been truly specified. Instead, most discussion has centered on the elasticity of the term, itself viewed as a breeding ground for abuse. See infra note 40 and accompanying text.

\item \textsuperscript{32} CALVO, supra note 31, at 350-351.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Id. One commentator stated that,

Practically all the great powers have at different times resorted to a display of force to give moral support to a request for the protection of nationals in foreign countries or for the redress of injuries inflicted upon nationals . . . . There seems little doubt that the great powers in their ready resort to ultimatums and threats of the use of force to exact the payment of pecuniary claims, particularly in Latin-America, have often abused their rights and have inflicted gross injustice upon weak states.

BORCHARD, supra note 30, at 447.
\item \textsuperscript{36} SHEA, supra note 10, at 21.
\item \textsuperscript{38} Id. at 12-13.
\item \textsuperscript{39} Id. at 13.
\end{itemize}
narrowly, thus limiting foreigners' ability to seek diplomatic protection. This limitation led to protests by other nations who believed that the Calvo Doctrine, by framing foreign investors' rights solely in terms of local Latin American standards, denied any concept of an international minimum standard of justice.40

Calvo's insistence that aliens first take their disputes to local tribunals led to constitutional enactments and other legislation in Latin America as early as 1886.41 These enactments made municipal courts a compulsory first stop for foreigners with claims against a Latin American state, thereby codifying and strengthening the exhaustion of local remedies rule.42

2. North American Dredging Company

North American Dredging Co. of Texas v. United Mexican States,43 heard in 1926 by the U.S.-Mexican Claims Commission, contains one of the most significant discussions of the enforceability of a Calvo clause in a contract between a state and foreign investor.44 In 1923, the governments of the United States and Mexico established the U.S.-Mexican General Claims Commission, an arbitral tribunal, to hear cases involving personal and property injuries that occurred during and following the Mexican revolution of 1910.45 The North American Dredging Co. case reversed prior caselaw and upheld the validity of a Calvo clause as a bar to a claim against Mexico for breach of contract.46

In this case, a U.S. company was sued for recovery of losses and damages allegedly suffered from a breach of contract for dredging at the port of Salina Cruz.47 The Mexican government challenged the Commission's jurisdiction, claiming that the parties' contract included a Calvo clause which "deprives the party subscribing [to] said Clause of the right to submit any claims connected with his contract to an international commission."48 On this ground, the Commission sustained the Mexican

40. Borchard, supra note 30, at 809.
41. Id. at 795.
42. Id. at 793.
44. Shea, supra note 10, at 196.
45. Id. at 195-96.
46. North American Dredging Co., 4 Rev. Int'l Arb. Awards at 26 (1926). The decision did not state that all Calvo clauses were valid in any situation. The Commission declared that alternative international remedies would remain available to a foreigner because to do otherwise would constitute a denial of justice. Id. at 25. In later decisions, however, the Commission did state that to constitute a denial of justice, the interest involved would have to be substantial and the conduct of the state "grave." See, e.g., El Oro Mining and Railroad Co., 5 Rev. Int'l Arb. Awards 191 (1931).
48. Id. at 27. The Calvo clause read:
    The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfillment of this contract. They shall not claim, nor shall they have, with regard to the interests and
government's motion for dismissal of the claim.49

The Commission held that the contract's Calvo clause precluded the U.S. company involved from requesting diplomatic protection and required it to first seek relief in local courts.50 The Commission's decision did not, however, represent a sweeping endorsement of Calvo clauses in general. The Commission stated that "it is quite possible to recognize as valid some forms of waiving the right of foreign protection without thereby recognizing as valid and lawful every form of doing so."51 The Commission also stated that a Calvo clause in a contract would not preclude diplomatic intervention in the event of a violation of international law.52

Subsequent arbitral decisions followed the reasoning of North American Dredging Co. and held that a foreign investor's contractual waiver of diplomatic protection would be effective unless it resulted in a "denial of justice."53 In these decisions, the Commission limited the circumstances in which a "denial of justice" would be found to those instances where the interest involved was substantial and the conduct of the state grave.54

3. The Calvo Doctrine and Foreign Policy

Since North American Dredging Co., the insertion of a "Calvo clause" in contracts between States and foreign investors has achieved partial international acceptance on the theory that a voluntary waiver of diplomatic protection is binding upon a foreign investor, although a foreign investor's home state may still choose to ignore his waiver. Today, many Latin American countries continue to subject their investment contracts to Calvo clauses.55

Calvo clause principles continue to form conspicuous parts of documents that are considered the cornerstones of hemispheric foreign pol-

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49. Id. at 26.
50. Id. at 30.
51. Id. at 28.
52. Id. at 29.
53. See e.g., Interocceanic Railway Co. of Mexico, 6 Annual Digest 199 (1931-32); El Oro Mining and Railroad Co., 5 Rev. Int'l Arb. Awards at 191.
54. Id. Donald Shea argues that Latin-American countries have tried to define "denial of justice" even more narrowly:

[These countries] have tried to define the term unilaterally so as to cover only outrageous derelictions by the courts when they refuse access to the judicial remedies, when they refuse to render a decision, or when they flagrantly deny due process of law. This restricted procedural definition of the term, which would virtually exclude interposition, has not won wide acceptance by foreign offices, courts, or the leading publicists of the world.

Shea, supra note 10, at 115.
55. Jova, supra note 37, at 12.
These principles are embodied in the constitutions and statutes of Latin American countries as well as in treaties concluded among them. They are also contained in recent inter-American instruments such as the 1976 opinion of Transnational Enterprises of the Inter-American Juridical Committee and international resolutions such as the 1974 U.N. Charter of Economic Rights and Duties of States (CERDS).

II. ANCOM and the Calvo Doctrine

A. Origins and Organization of ANCOM

In 1969, the governments of Bolivia, Chile, Colombia, Ecuador, and Peru signed the Cartagena Agreement, which created the Andean Common Market (ANCOM). Venezuela did not join ANCOM until 1973, and Chile


58. Work Accomplished by the Inter-American Juridical Committee During Its Regular Meeting Held from January 12 to February 13, 1976, at 147, OAS Doc. OEA/Ser.Q/IV.12CJI-27 (May 1976). The Committee stated that:

Transnational enterprises and the corporations comprising them are not persons under international law and lack jus standi in international courts. The American states should abstain from adhering to conventions which in any way grant those enterprises or the corporations comprising them direct access to international courts, including arbitration courts, because this would justifiably place transnational enterprises in an advantageous position over national enterprises. The questions posed by transnational enterprises could eventually be heard by international courts through agreements entered into by the states to resolve their disputes. International courts receive their competence by express consent of the states.

Id.


[Each State has the right to] nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

Id. art. 2(2)(c). See also discussion infra part IV.B.

A main purpose of the Cartagena Agreement was to adopt a common strategy for economic development based on certain shared goals. Specifically, the Agreement called for developing a "coordinated procedure in . . . development planning . . . and a harmonization of . . . economic and social policies, directed toward future adoption of a concerted planning system for the integrated development of the area." More importantly, Article 27 of the Agreement mandated a "common system for treatment of foreign capital." Procedurally, the Andean Board and the Andean Commission are the principal organs of the Andean Agreement and must act in the collective interest of all of the members of the Agreement. The Andean Commission, however, is the "supreme organ of the Agreement, constituted by one plenipotentiary representative from each of the Member State Governments." The Commission's most significant responsibility is "[t]o formulate the general policies of the Agreement and to adopt any measures necessary to achieve its objectives." Significantly, Member States must implement the Commission's measures within six months after the Commission adopts them.

**B. ANCOM's Decision 24**

In 1970, the Andean Commission, in an attempt to establish a common system for the treatment of foreign investment, issued Decision 24, also known as the Foreign Investment Code (the "Code"). At the time the Code was formulated, many Latin American nations were under the influence of strong protectionist sentiments, sentiments which remained significant through the early 1980s.

Article 30 of the Code required a foreign direct investor to divest itself of majority control of an enterprise within fifteen or twenty years. Further information can be found in [Jova, supra note 37, at note 41.](#)

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61. Jova, supra note 37, at note 41.
62. Cartagena Agreement, supra note 60, art. 25.
63. Id. art. 26.
64. Id. art. 27.
65. Id. art. 5.
66. Id. arts. 13, 14.
67. Id. art. 6.
68. Id. art. 7(a).
69. Id. art. 27.
72. Decision 24, supra note 70, art. 30. Specifically, Article 30 states that: Foreign enterprises that may be established in the territory of any Member Country . . . shall agree, in representation of their shareholders, to place on sale . . .
In 1987, the Andean Commission repealed Decision 24 and replaced it with Decision 220. The Commission reformulated its national treatment standard in Article 33, which provided that “Member Countries [could] not grant foreign investors a more favorable treatment than that granted to national investors.” In effect, this provision is identical to Article 50 of Decision 24. Both prohibit a Member Country from treating a foreign investor better than its own nationals.

Regarding dispute settlement, Decision 220 somewhat mitigates the Calvo Doctrine prohibition on diplomatic intervention. Under Article 34, “[f]or the settlement of disputes or conflicts deriving from direct foreign investments or from the transfer of foreign technology, Member Countries shall apply the provisions established in their local legislation.” Thus, unlike Article 50 of Decision 24, each Member Country could independently decide the extent of foreign investor access to arbitration or diplomacy.
matic intervention. Without this grant of independence, Article 27 of the Cartagena Agreement would require ANCOM members to implement Commission measures covering the treatment of foreign capital. However, this latter tenet of the Calvo Doctrine remains unimportant even after the enactment of Decision 220 because the legislation enacted by most ANCOM members prohibits arbitration and diplomatic intervention.

D. ANCOM's Decision 291

In 1991, the Andean Commission repealed Decision 220 and replaced it with Decision 291, arguably the most lenient of the three Decisions. Unlike the "bright line" national treatment provisions contained in the previous Decisions, Decision 291 grants individual Member Countries the right to determine how foreign investors will be treated in their respective legal systems. This freedom of choice is evident in Article 2, which provides that "foreign investors shall have the same rights and obligations as pertain to national investors, except as otherwise provided in the legislation of each Member Country."

Article 10 of Decision 291, which covers dispute settlement provisions, conforms with Article 34 of Decision 220. Regarding a foreign investor's right to diplomatic protection, Article 10 states that, "[the Member Countries shall apply that provided in their domestic legislation with respect to the solution of controversies or conflicts deriving from direct foreign investment or subregional investment or the transfer of foreign technology." Thus, the greater discretion given to individual ANCOM members regarding the settlement of investment disputes parallels the greater discretion that they possess in determining the standard of treatment for foreign investors.

Although each successive decision was less draconian in its treatment of foreign capital, each also contains aspects of the Calvo Doctrine's two central tenets, the national treatment standard and the prohibition against diplomatic intervention. More importantly, components of these two principles are contained in current Decision 291. Consequently, the delegation of decision-making power to Member Countries has not eliminated the Calvo Doctrine from relevance.

III. The Multilateral Investment Guarantee Agency

Although the international community, including the World Bank, considered creating a multilateral investment insurance agency in the late

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82. Cartagena Agreement, supra note 60, art. 27.
83. See infra part IV.C.
85. Id. art. 2.
86. Id.
87. Id. art. 10.
88. Id. arts. 2, 10.
1950s, no such agency existed until 1981 when World Bank officers proposed a World Bank-controlled investment guarantee agency. During the intervening period, both national governments and private agencies created various organizations with the purpose of improving the investment climate in less developed countries. These organizations included the World Bank-sponsored International Finance Company (IFC), specializing in the promotion and financing of the private sector, and the International Center for the Settlement of Investment Disputes (ICSID). In addition, corporations and governments created national and private investment insurance programs such as the U.S. Overseas Private Insurance Corporation (OPIC).

The Multilateral Investment Guarantee Agency entered into force on April 12, 1988 after ratification by the United States and the United Kingdom. The Agency's basic objective is to "enhance the flow to developing countries of capital and technology for productive purposes under conditions consistent with their development needs, policies and objectives, on the basis of fair and stable standards for the treatment of foreign investment." To meet these objectives, the Agency "issue[s] guarantees against non-commercial risks in respect of investments in a member country...

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89. Theodor Meron, Investment Insurance in International Law 31 (1976).
93. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 159 [hereinafter ICSID Convention]. ICSID had its roots in a study initiated by the World Bank in 1962. Responding to what it felt were drawbacks in foreign investment dispute settlement mechanisms of the time as well as in the hopes of encouraging foreign investment in less developed countries, the World Bank study examined the feasibility of establishing an institution to facilitate the settlement of international disputes through arbitration. See Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 4 I.L.M. 524, 712 (1965). The ICSID Convention was submitted for ratification in March 1965 and entered into force on October 14, 1966 after ratification by twenty countries. ICSID Convention, supra, art. 68(2). At this time, every Latin American nation voted against ratifying the ICSID Convention. Id.
95. While some countries had ratified the MIGA Convention two years earlier, the Convention had to pass certain hurdles before it could be enacted. Specifically, the MIGA Convention required ratification by at least five "Category One" countries (developed countries) and at least fifteen "Category Two" countries. MIGA Convention, supra note 3, art. 61(b).
96. MIGA Convention, supra note 3, pmbl.
which flow from other member countries" and "carry out . . . complementary activities to promote the flow of investments to and among developing member countries."97

A. Ownership and Voting Arrangements

The MIGA Convention provides that all Member Countries will receive equal voting power when all members of the World Bank become members of MIGA.98 Until that time, signatories to the MIGA Convention are divided into two categories, developed and developing countries.99 For the first three years after MIGA entered into force, each category of countries was entitled to additional votes in order to maintain a minimum forty percent of the total voting power.100 The Convention provided for a reallocation of shares after the first three years to ensure parity before additional countries could join.101 MIGA commentators hope that the Convention's emphasis on voting power parity will be a strong incentive for ratification by developing countries.102

B. Covered Risks and Eligible Investments and Investors

The Convention expressly covers four broad categories of non-commercial risk: (1) currency transfer risk; (2) the risk of expropriation or similar measures;103 (3) breach of contract risk;104 and (4) the risk of war or other civil disturbance.105 Additionally, "upon the joint application of the investor and [a] host country" the Agency's Board of Directors can extend coverage to non-commercial risks other than those covered by the four

97. Id. art. 2(a), (b).
98. Id. art. 39(a), (b). The rationale for this is that "[t]he voting structure of the Agency reflects the view that Category One and Category Two countries have an equal stake in foreign investment, that cooperation between them is essential, and that both groups of countries should, when all eligible countries become members, have equal voting power (50/50)." Commentary on the Convention Establishing the Multilateral Investment Guarantee Agency, 1 ICSID Rev. for Inv. L.J. 195, ¶ 63 (1986) [hereinafter Commentary].
99. MIGA Convention, supra note 3, sched. A.
100. Id. art. 39(b).
101. Id. art. 39(c).
102. Rowat, supra note 6, at 128. "MIGA's voting structure clearly reflects the attempt to avoid a majority vote for capital exporting countries." Berger, supra note 1, at 24. "The Convention basically follows the Bretton Woods model of weighted voting, offering each member country 177 membership votes and one additional vote per share subscribed." Id. To further the goal of parity between countries, "during the critical period of the first three years, each group is assured a minimum of 40 percent of total voting power by allocation of supplementary voting shares as necessary." Id. at 25.
103. This provision does cover "measures attributable to the host government such as nationalization, confiscation, sequestration, seizure, attachment and freezing of assets." Commentary, supra note 98, ¶ 14. This provision does not cover "[m]easures normally taken by governments to regulate their economic activities such as taxation, environmental and labor legislation as well as normal measures for the maintenance of public safety" as long as these measures do not discriminate against the guarantee holder. Id.
104. MIGA Convention, supra note 3, art. 11(a)(iii). Coverage under this provision is predicated on the exhaustion of local remedies in a timely fashion or the lack of enforceability of such a remedy. Id.
105. Id. art. 11(a)(i), (ii), (iii), (iv).
In an attempt to "strike a balance between the need to preserve the Agency's scarce capital to promote flows of direct investment and the need to assure future flexibility by allowing [the Agency's Board of Directors] to extend coverage to other types of investments," MIGA established broad and flexible criteria for the eligibility of both investors and investments. MIGA's initial emphasis is on "equity investment, different forms of equity investment, and medium- or long-term loans made or guaranteed by owners of equity in the enterprise concerned." In accord with the goal of maximum flexibility, however, MIGA's Board, by special majority decision, may extend coverage to additional forms of investment. Before an investment is guaranteed, MIGA must authorize the investment and subject it to a substantive review.

Under Article 13 of the MIGA Convention, an investor must be a national of a Member Country other than the host country to be eligible to receive a guarantee. A juridical person, e.g., a corporate entity, is eligible provided that

[it] is incorporated and has its principal place of business in a member or the majority of its capital is owned by a member or members or nationals thereof, provided that such member is not the host country in any of the above cases . . . and such juridical person . . . operates on a commercial basis.

This exception is thought to be "consistent with the Agency's central objective of channelling the flow of investment to developing countries, some of which now have nationals living abroad with considerable off-shore funds."

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106. Id. art. 11(b).
108. Id. According to Mr. Shihata, this language would include investments such as "various forms of industrial cooperation such as management and service contracts, licensing and franchising agreements, turnkey contracts as well as arrangements concerning the transfer of technology and know-how where the investor assumes a stake in the performance of the venture." Shihata, supra note 4, at 15.
109. MIGA Convention, supra note 3, art. 12(b).
110. Id. art. 12(d)(i)-(iv). Specifically, the article provides that before guaranteeing an investment, MIGA shall satisfy itself as to:
   (i) the economic soundness of the investment and its contribution to the development of the host country;
   (ii) compliance of the investment with the host country's laws and regulations;
   (iii) consistency of the investment with the declared development objectives and priorities of the host country; and
   (iv) the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment.
111. Id. art. 13(a)(ii), (iii).
112. Id. art. 13(c).
113. Commentary, supra note 98, ¶ 23.
C. Dispute Settlement Provisions

Of particular importance to Latin American countries considering membership in MIGA is the Convention's dispute settlement provisions. For most disputes, the MIGA Convention establishes a framework of negotiations and conciliation, and if this fails, subsequent arbitration under ICSID-like rules. The Convention, however, allows members to choose alternative dispute settlement mechanisms provided that MIGA's Board of Directors approves the alternative by a special majority prior to the commencement of coverage in the concerned member's territory. These agreements would override the Convention-provided dispute settlement mechanisms.

The MIGA Convention anticipates four different types of disputes that would require established settlement procedures:

(a) disputes over interpretation and application of the Convention between a member and the Agency or among members;
(b) guarantee or reinsurance contract disputes between the Agency and another party;
(c) where the Agency is acting as subrogee of an investor in a dispute with another member; and
(d) disputes other than those under (a), (b), or (c) between the Agency and a member or former member.

The MIGA Convention mandates resolution mechanisms for each type of dispute. The Convention gives MIGA's Board of Directors the responsibility of settling disputes over the Convention's interpretation and application. Guarantee or reinsurance contract disputes between MIGA and an insured member are to be settled by arbitration in accordance with the rules agreed upon in the parties' contract. More importantly, MIGA envisages that standard contract guarantees will provide for arbitration under ICSID-like rules.

In the event that MIGA pays a claim, the Agency "shall be subrogated to such rights or claims related to the guaranteed investment as the holder of a guarantee may have had against the host country." Under Article

114. MIGA Convention, supra note 3, Annex II, arts. 3, 4.
115. Id. Annex II, arts. 2, 3(a), 3(b), 4(e).
116. Id. Additionally, most MIGA proponents argue that these agreements, if they are to be justified at all, have to provide for different methods which are consistent with the constitutional requirements of the country concerned.
117. Commentary, supra note 98, ¶¶ 76(a)-(d).
118. MIGA Convention, supra note 3, art. 56(a). The Board, consisting of no less than twelve Directors, is appointed by the President of the World Bank, who acts as ex officio Chairman of the Board. Id. art. 32.
119. Id. Annex II, art. 4.
120. Id. art. 18(a). According to Black's Law Dictionary, [subrogation denotes the exchange of a third person who has paid a debt in the place of the creditor to whom he had paid it, so that he may exercise against the debtor all the rights which the creditor, if unpaid. Insurance companies, guarantors and bonding companies generally have the right to step into the shoes of the party whom they compensate and sue any party whom the compensated party could have sued.}
of the Convention, the Agency would, in the end, have recourse to international arbitration to enforce its subrogated rights against the host country.\textsuperscript{121}

IV. The Dependency Theory, the Calvo Doctrine, and Latin America

MIGA proponents argue that since the formulation of the Calvo Doctrine, new and significant developments have occurred in the area of international investment law that make the doctrine irrelevant.\textsuperscript{122} Focusing on the economies of Latin American countries, these commentators argue that the sheer economic need for foreign investment in Latin American countries reduces any adherence to Calvo Doctrine principles to a mere kind of lip service.\textsuperscript{123}

By focusing only on an economic cost-benefit analysis, however, MIGA proponents ignore the socio-political context which makes the Calvo Doctrine influential even today in many Latin American countries. There is an alternative view that purely economic and market conditions are not the only relevant factors in the investment bargaining process between investor and developing country.\textsuperscript{124} According to one view, "the inevitable frictions that occur when differing cultures, value systems, and standards of living meet under competitive circumstances" also form a part of the investment bargain and cannot be ignored by either side.\textsuperscript{125} Furthermore, "[t]hese factors, no matter how irrelevant or 'political' they may seem in strict economic terms, directly influence the terms of the investment bargain by dampening incentives on one side or the other."\textsuperscript{126}

Calvo principles are especially important in this context. The Calvo Doctrine informs the absolutely necessary political considerations that go into any foreign direct investment project. The continued reliance of Latin American countries on Calvo-influenced investment policies can be seen in the "dependency theory" view of economic development, resolutions such as the Charter of Economic Rights and Duties of States (CERDS),\textsuperscript{127} and associations such as ANCOM. Thus, the first argument advanced by MIGA proponents, that the Calvo Doctrine is irrelevant, is misguided.

A. The Dependency Theory and the Calvo Doctrine

Calvo principles are alive and well in the basic tenets of the dependency theory. Formulated by Latin American political scientists, the theory's basic argument is that the ultimate goal of Latin America is to improve the standard of living and social well-being of its people through industrialization.

\textsuperscript{121} MIGA Convention, \textit{supra note} 3, art. 57(b).
\textsuperscript{122} Shihata, \textit{supra note} 4, at 3-4.
\textsuperscript{123} \textit{Id.} at 3.
\textsuperscript{124} Jova, \textit{supra note} 37, at 7. \textit{See also} James Cockcroft \textit{et al.}, \textit{Dependency and Underdevelopment} (1972).
\textsuperscript{125} \textit{Id., supra note} 37, at 7.
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} CERDS, \textit{supra note} 59.
tion. However, this goal can be achieved only if the Latin American economies acquire enough strength to compete autonomously as exporters. Until they are able to do so, Latin American countries will remain "dependent on economic forces outside their control."

The dependency theorists believe that although foreign private investment helped to raise the level of industrialization in Latin America, it has not served the other goals stated above. Thus, "Latin American countries remain dependent on foreign corporations and capital-exporting countries to sustain [future] development and [are] thus vulnerable to the negative, anti-developmental aspects of [foreigners'] roles in their economies." These theorists also assert that since the current situation benefits the industrialized countries they are unlikely to do anything to bring about real development in Latin America.

The Calvo Doctrine is an important part of the dependency theory's view of development. Calvo principles provide a framework for dependency theorists on which rests their vision of how foreign investment should fit into their economies. Latin American dependency theorists construe the role of foreign investment in terms of how it should fit into their municipal standards of development. This construction is quite similar to how the Calvo Doctrine construes standards of legal treatment in municipal terms.

B. CERDS and the Calvo Doctrine

Calvo principles also played a role in the Charter of Economic Rights and Duties of States initiative. The rationale underlying CERDS was that the wealthier nations, who seemed unwilling or unable to assist poorer nations in the southern half of the globe, controlled most of the financial institutions which affected international trade. Charter proponents saw the economic gap between the richer and poorer nations grow in conjunction

129. Id.
130. Id.
131. Id.
132. Id. These negative aspects of foreign investment include:
   (i) the possibility that the foreign investor will outperform and possibly displace the national investor;
   (ii) local firms, not being as solid a credit risk as a large foreign firm, will not be able to expand or diversify its operations to the same extent as the foreign firm;
   (iii) the foreign firm has an unequal bargaining position in that it can always "pack-up" and go home, taking with it technology and know how. This fact inhibits negotiation and true cooperation in development efforts; and
   (iv) possible negative effect on the balance of payments attendant upon dependency and that this effect is heightened by foreign investments in the manufacturing sector.

Id. at 16-17.
133. Jova, supra note 37, at 17.
with what they felt were trade imbalances and believed that CERDS could provide "a new and more equitable treatment in development assistance."136

The drafters intended to set out the rights and duties of states which should become part of international law.137 The richer nations mustered so much resistance, however, that a charter containing legally binding principles was impossible to achieve.138 Thus, while the resulting General Assembly resolution was not binding under international law, it reflected the expectations of a large portion of the international community and was unanimously endorsed by all Latin American countries.139

The Charter itself sought to globalize the Calvo Doctrine.140 This goal is illustrated by Article 2 of the Charter.141 Article 2 rejects any right of a foreign investor to diplomatic protection.142 Furthermore, the Charter provides that in cases of expropriation of foreign owned property, the expropriating state has only a duty to pay appropriate compensation, "taking into account its relevant laws and regulations and all circumstances [it] considers pertinent."143 Finally, under the Charter all controversies are to be resolved exclusively within the municipal courts of the taking states unless otherwise agreed by the parties.144 Thus, the Charter clearly enunciated the Calvo Doctrine's national treatment standard and prohibition against diplomatic protection. The Charter and its Calvo principles were overwhelmingly endorsed by less developed countries who firmly believed in having Calvo-influenced legal responses available to them in the event of an investment dispute.145

C. ANCOM and the Calvo Doctrine

Influenced by the dependency theory, Latin American countries confront potential investors with an expanding idea of how foreign investments should fit into their national economic development plans.146 This shift in attitude exists in most Latin American countries, particularly the regional association of South American states known as ANCOM. Underlying ANCOM's foundation is the belief that Latin American countries should
formulate their own detailed, positive plan for developing an industrialized society. The influence of the dependency theory, and its embodiment in the Calvo Doctrine provisions of ANCOM decisions, clearly show that non-economic factors influence Latin American deliberations on foreign investment in their respective countries.

1. Overview

The repeal of ANCOM's rigid Decisions 24 and 220 may be cited as evidence that the Calvo Doctrine's grip on Latin American foreign investment laws is loosening. However, an examination of Decision 291, which replaced Decisions 24 and 220, reveals that Calvo principles are still available to Member States. Article 2 of Decision 291 shows the continuing influence of the Calvo Doctrine's national treatment standard by providing that "foreign investors shall have the same rights and obligations as pertain to national investors, except as otherwise provided in the legislation of each Member Country." The only difference is that the use of the national treatment standard is now determined at the individual state level rather than being dictated by ANCOM.

Furthermore, regarding the settlement of investment disputes, the Calvo principle against diplomatic intervention also survived in Article 10 of Decision 291. Although not as inflexible as Article 51 of Decision 24, which prohibited any "clauses that remove possible conflicts from the national jurisdiction and competence of the recipient country or allow the subrogation by States to the rights and actions of their national investors," Decision 291 may still have ramifications for the uninformed foreign investor. As with the national treatment standard, the origin of the diplomatic intervention provisions has merely been shifted to individual Member Countries. An examination of two representative ANCOM Member Countries, Bolivia and Peru, clearly shows the continuing strength of Calvo clause principles in Latin America.

2. Bolivia

National treatment standard principles are evident in Article 2 of the Bolivian Foreign Investment Law, which states that, "except where otherwise established by law, foreign investors and the entities or companies in which they take part have the same rights, duties and guarantees that the laws and regulations give to national investors." The significance of the national treatment standard is further emphasized in Article 3, which provides that "[n]either Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party

147. Id.
148. Decision 291, supra note 84.
149. Id. art. 2.
150. Id. art. 10.
151. Cartagena Agreement, supra note 60, art. 51.
to treatment less favorable than that which it accords to investments or returns of nationals or companies of any third State.\textsuperscript{153}

Calvo principles related to diplomatic intervention are evident in Article 24 of the Bolivian Constitution, which provides that “foreign subjects and enterprises are subject to Bolivian laws, and in no case may they . . . have recourse to diplomatic claims.”\textsuperscript{154} Thus, unless permitted by some other law, foreigners may not seek diplomatic protection.\textsuperscript{155}

3. **Peru**

As in Bolivia, the Calvo Doctrine national treatment standard manifests itself in Peruvian laws. The national treatment standard ideal is included in Article 2 of Decree 662 of 1991, which provides that, except for constitutional limitations, foreign investors have rights and obligations equal to those of national investors.\textsuperscript{156}

With respect to diplomatic intervention, neither Peru’s Constitution nor its Foreign Investment Law explicitly address a foreigner’s right to diplomatic protection.\textsuperscript{157} However, a presumption does exist in favor of settling investment disputes before Peruvian courts.\textsuperscript{158} To this end, Peruvian law provides that “[t]he State may agree to submit disputes arising from stability agreements to Arbitration Courts as foreseen in international treaties of which Peru is a party.”\textsuperscript{159} There is no guarantee, however, that a foreign investor will be able to have his dispute heard by an international arbitration panel.

V. **The Calvo Doctrine’s Ramifications for MIGA**

If, as argued above, the Calvo Doctrine remains an important aspect of Latin America’s legal treatment of foreign investment, there are important implications for MIGA’s role in Latin American countries. Calvo principles may prevent some Latin American countries from becoming signatories of MIGA. For Latin American countries that do become signatories of the MIGA Convention, Calvo Doctrine principles in their legislation or government contracts may affect MIGA’s ability to attain its goal of increasing foreign direct investment flows to these countries. MIGA proponents argue, however, that the MIGA Convention provisions offer benefits similar to, if not better than, those offered by the Calvo Doctrine, thus encouraging

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\textsuperscript{153} Id. art. 3.
\textsuperscript{154} Bolivian Const., \textit{supra} note 57, art. 24.
\textsuperscript{155} Id.
\textsuperscript{156} Legis. Decree 662, art. 2, El Peruano, Sept. 2, 1991 [hereinafter Legislative Decree 662].
\textsuperscript{158} Legislative Decree 662, \textit{supra} note 156, art. 16.
\textsuperscript{159} Id.
Latin American countries to become members of MIGA. Even if this assertion is correct, these provisions may work against MIGA's goal of encouraging the flow of foreign direct investment to Latin America.

In the following section, this Note first argues that the Calvo Doctrine's non-economic considerations, as they appear in the dependency theory, may keep many Latin American countries from signing the MIGA Convention. Next, this Note examines the effect of specific MIGA provisions as either hindrances or incentives in MIGA's recruitment of Latin American countries. The Note concludes that MIGA incentives may have a negative impact on MIGA's attempt to encourage foreign direct investment in Latin America.

A. The Impact of the Dependency Theory on MIGA

MIGA promoters assert that Latin American countries' desire for foreign investment outweighs all other considerations. However, as the dependency theory illustrates, significant non-economic factors may play a role in Latin America's treatment of foreign direct investment. As one scholar stated, "purely economic factors and market conditions are not the only [factors] that enter the bargaining game between investor and developing country." To this end,

[w]hile varying in their approaches and aggressiveness, Latin American countries have achieved an uncommon harmony in terms of basic goals and strategies: all want industrialization as a basis for economic growth; all want a determining voice in their design of their economic futures; and none want "dependency" upon the developed nations. (emphasis added)

Promoters of MIGA discount the dependency theory and Calvo principles, stating that the classification of countries which underpins these principles is no longer relevant. Although "foreign direct investments still originate mainly in the U.S. and Europe," the promoters believe that other factors mitigate this situation.

One need only examine the actual MIGA Convention provisions to see that the promoters' logic is belied by the very Convention they created. First, the MIGA Convention categorizes Member Countries (and potential Member Countries) for voting purposes on a basis very similar to the sup-


161. Shihata, supra note 4, at 24-25.
162. Jova, supra note 37, at 7.
163. Id. at 5.
164. Shihata, supra note 4, at 3-4.
165. Id. at 4.
posedly "non-relevant" developing and developed country classification.\textsuperscript{166} Furthermore, the voting mechanics based on the Convention's categorization reflect the MIGA promoters' concern of avoiding an appearance of inequality.\textsuperscript{167} Thus, the very classification of countries which MIGA promoters argue is dead is very much alive in the MIGA Convention itself. Indeed, this classification is at the heart of the Convention.

MIGA promoters also assert that the current desire in Latin American countries for foreign direct investment proves that non-economic, "political considerations" such as the Calvo Doctrine are overvalued.\textsuperscript{168} This position also is supported by faulty logic. It implies that today's status quo is tomorrow's economic reality. This has never been the case and is certainly not the case in Latin America. Throughout history, dramatic swings between boom and bust have characterized Latin American economies.\textsuperscript{169} Thus, while MIGA promoters base their assertions on the current eagerness of Latin American governments to attract foreign direct investment, there is no guarantee that this eagerness will last forever. Moreover, if, as is argued in this Note, Calvo Doctrine principles are still contained in Latin American constitutions, legislation, and government contracts, the climate for foreign direct investment in the future may be much less friendly.

The continuing presence of Calvo Doctrine principles in Latin America leaves the door open for currently disfavored "non-economic" considerations to come into play. MIGA promoters may argue that possible adverse effects and publicity stemming from negative actions a Latin American country might take are adequate protection for this risk. In response, one need only look at past expropriations of foreign investor property and other adverse actions taken against foreign investments to realize that many investors are forgetful (a forgetfulness many times induced by the promise of high investment returns).

\section*{B. MIGA Provisions as Hindrances to Latin American Ratification}

Latin American countries historically have been hostile toward the ideas of subrogation\textsuperscript{170} and arbitration as they apply to foreign direct investment disputes.\textsuperscript{171} This hostility stems from the belief that subrogation and arbitration give foreigners access to diplomatic protection not available to a

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{166}]. See MIGA Convention, supra note 3, sched. A. Member Countries are divided into two categories for voting purposes. Category One countries include the European countries, North American countries, Australia, and South Africa. Category Two countries include Caribbean countries, Latin American countries, and African countries. \textit{Id.}
\item[\textsuperscript{167}]. \textit{Id.} cmt. 63. Under the Convention, both home and host countries will receive equal voting power when all World Bank members become MIGA members. \textit{Id.} art. 39(a). During MIGA's first three years, Category Two nations would be guaranteed forty percent of the total votes. \textit{Id.} arts. 3(d), 39(b), 39(d). One commentator expressly noted that a significant rationale for these MIGA voting procedures was to "provide[e] a strong incentive for developing countries to participate." \textit{Rowat, supra} note 6, at 128.
\item[\textsuperscript{168}]. \textit{Shihata, supra} note 4, at 3.
\item[\textsuperscript{169}]. For an informative brief historical overview of Latin American economies and foreign investment in those economies see \textit{Jova, supra} note 37, at 8-10.
\item[\textsuperscript{170}]. \textit{Shihata, supra} note 4, at 20.
\item[\textsuperscript{171}]. \textit{Id.}
\end{enumerate}
\end{footnotesize}
country's own nationals.\textsuperscript{172} To many Latin Americans, this access violates the equality demanded by the Calvo Doctrine's national treatment standard.\textsuperscript{173} Thus, for MIGA to enlist Latin American countries as members, these reservations must be addressed and overcome.

1. \textit{MIGA Subrogation Provisions}

Under the MIGA Convention, after paying or agreeing to pay an insured investor's claim, MIGA will succeed to the investor's rights against the host country.\textsuperscript{174} After such subrogation, disputes between MIGA and a host country may ultimately be submitted to international arbitration.\textsuperscript{175} Regarding subrogation, MIGA promoters argue that Latin American states do not object to the subrogation process in general. Rather, it is only the subrogation of a sovereign state to the claims of private foreign nationals that many Latin American countries refuse to recognize.\textsuperscript{176} Because MIGA is not a state, but rather an international agency, this reluctance to accept subrogation is unfounded.

As proof of this assertion, MIGA proponents point to twenty-eight executive agreements between the United States and Latin American and Caribbean countries which recognize the subrogation of the Overseas Private Investment Corporation (OPIC) to the rights of certain U.S. investors.\textsuperscript{177} MIGA proponents assert that there is no reason to treat their international agency any less favorably.\textsuperscript{178}

This argument, however, is disingenuous. While it is true that Latin American countries have concluded executive agreements with the United States containing subrogation provisions, many of these agreements still contain Calvo Doctrine exclusions and reservations.\textsuperscript{179} For example, a 1985 U.S.-Bolivia agreement "provides for appointment of a fiduciary agent who holds rights or claims for OPIC, instead of OPIC itself, and conditions arbitration on the exhaustion of appeals and administrative and judicial remedies available in Bolivia."\textsuperscript{180} Requiring foreign investors to exhaust local remedies ensures that MIGA's protection of foreign investors may be limited.\textsuperscript{181}

\begin{thebibliography}{99}
\bibitem{172} Baker \& Yoder, \textit{supra} note 8, at 90.
\bibitem{173} Id.
\bibitem{174} MIGA Convention, \textit{supra} note 3, art. 18(b).
\bibitem{175} Id. Annex II, arts. 2, 3(a), 3(b), 4(e).
\bibitem{176} Shihata, \textit{supra} note 4, at 19.
\bibitem{178} Shihata, \textit{supra} note 4, at 20.
\bibitem{180} Berger, \textit{supra} note 1, at 36 n.149.
\end{thebibliography}
2. MIGA International Arbitration Provisions

MIGA's international arbitration provisions also implicate Calvo Doctrine diplomatic intervention principles. MIGA requires that, in the event of a dispute between MIGA and a host country with respect to MIGA's subrogated claim, the parties must first attempt to settle the claim through negotiation.\textsuperscript{182} Failing successful negotiation, Article 57 of the MIGA Convention requires disputes to be submitted to international arbitration unless MIGA and the Latin American country agree on an alternative dispute settlement procedure.\textsuperscript{183} In the absence of an alternative dispute mechanism, this provision would violate many Latin American laws, such as Bolivia's and Peru's prohibitions against, or limitations on, diplomatic protection.

Arguably, MIGA can overcome these prohibitions under Article 57(b), which authorizes MIGA to enter into individual agreements establishing alternative dispute mechanisms with host countries requesting such an alternative.\textsuperscript{184} However, such agreements must be entered into before MIGA begins operations in the host country.\textsuperscript{185} These agreements would supersede the dispute settlement procedures provided by the MIGA Convention.\textsuperscript{186} Although this provision may accomplish its goal of encouraging ANCOM Member Countries and other Latin American countries to sign the MIGA Convention, it will limit MIGA's effectiveness. A country with foreign investment laws similar to those of Bolivia and Peru could simply bypass the "depoliticized" MIGA procedures and insist on a dispute settlement mechanism compatible with Calvo diplomatic intervention principles. This alternative dispute mechanism would supplement the MIGA Convention's requirement that a foreign investor exhaust local remedies.

Through the exercise of this Alternate dispute mechanism option, MIGA may, prior to undertaking operations in a given country, enter into a bilateral agreement with it, thereby adjusting the dispute settlement mechanism to the peculiar legal and political situation of such a country. For instance, it may agree to... exhaust local remedies in the host country as a condition precedent or an alternative to resorting to arbitration under Annex II to the Convention.\textsuperscript{187}

In this type of situation it is difficult to see how MIGA substantively improves a foreign investor's plight in an investment dispute with a host country. The Calvo Doctrine's national treatment standard, the bane of many foreign investors, is specifically allowed for by MIGA. Although MIGA may refuse to undertake operations in a host country if it is not satisfied with a proposed alternative dispute settlement mechanism, too many of these refusals may prevent MIGA from meeting its goal of encouraging foreign direct investment flows to Latin America.

\textsuperscript{182} MIGA Convention, supra note 3, Annex II, art. 2.
\textsuperscript{183} Id. art. 57(b) and Annex II.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Shihata, supra note 4, at 21.
Finally, MIGA arbitration provisions create a strong arbitration system which is modeled on ICSID provisions. In particular, Article 4(j) of the MIGA Convention, like Article 54(1) of ICSID, provides that members must agree to recognize awards pursuant to arbitration and enforce them within their territories as if they were final judgments of their domestic courts. In addition, like ICSID, MIGA has provisions which prevent a party from frustrating arbitration proceedings by failing to select arbitrators.

While a strong arbitration provision modeled on ICSID may be attractive to a foreign investor, one needs only look at Latin American countries' relations with ICSID to realize that such a provision may be very unattractive to Latin America. The ICSID Convention was not ratified by a single Latin American country at its signing in 1964. This lack of support is not surprising because the very purpose of ICSID conflicts with Calvo Doctrine prohibitions on the international arbitration of foreign investment disputes. Latin America's reluctance to ratify the ICSID Convention is still present today, with only slow movement toward ratification by some Latin American countries. Thus, a MIGA arbitration mechanism based on ICSID is unlikely to convince Latin American countries to become members of MIGA.

C. MIGA Provisions as Incentives for Latin American Ratification

MIGA's problems in Latin America will not be solved even if most Latin American countries become signatories to the MIGA Convention. A further issue relates to MIGA's effectiveness. Because the MIGA Convention has numerous incentives and compromises built into it regarding Latin America and other reluctant developing countries, its ability to attract foreign investors and, furthermore, protect them adequately may be compromised. In the following section, this Note examines specific MIGA Convention provisions with two questions in mind: (1) will the provision actually act as an incentive for Latin American countries to become MIGA Member Countries, and (2) if so, does the benefit of that incentive come at the expense of MIGA's ability to effectively meet its goal of protecting foreign direct investment?

188. MIGA Convention, supra note 3, Annex II. MIGA, as a multilateral organization, cannot directly participate in ICSID arbitration procedures. Id. However, there is a strong presumption that any arbitration will be conducted under ICSID rules. Rowat, supra note 6, at 131.

189. MIGA Convention, supra note 3, Annex II, art. 4(j); ICSID Convention, supra note 93, art. 51(4).

190. MIGA Convention, supra note 3, Annex II, art. 4. See also Rowat, supra note 6, at 131.

191. Shihata, supra note 4, at 12.

192. Id.

193. It is interesting to note that these compromises and incentives were built into MIGA in order to combat the very principles, e.g., the Calvo Doctrine and the dependency theory, that MIGA promoters have argued are “overvalued.” If these doctrines are indeed overvalued, then why does the MIGA Convention work so diligently to overcome them?
1. Article 15: Sovereign Control Provision

MIGA promoters emphasize that Convention provisions recognize host countries' "sovereign control" over the treatment of foreign direct investment. Article 15 of the MIGA Convention provides that MIGA "shall not conclude any contract of guarantee before the host government has approved the issuance of the guarantee by the Agency against the risks designated for cover." Thus, before a foreign investor may obtain coverage from MIGA, a Latin American host government must approve not only MIGA's guarantee but also the investment being made. This provision could be an attractive incentive for Latin American countries to sign the Convention. Indeed, why would it not be? It is difficult to differentiate this provision from ANCOM Decision provisions regarding Member Countries' common development objectives in regards to foreign investment. As under the ANCOM Decisions, ANCOM members (and other developing countries) who join MIGA will have the final say on what is and is not an appropriate foreign investment for their economies.

Similarly, just as the ANCOM Decisions offered little protection to foreign direct investors, so does MIGA's Article 15. Under Article 15, a Latin American signatory to the Convention can "have its cake and eat it too." The signatory can expressly condition their approval of both MIGA coverage and the MIGA covered investment on acceptance of Calvo Doctrine principles.

2. Article 11: Covered Risks Provision

Four types of non-commercial risk may be covered by Article 11 of the MIGA Convention. One of the covered risks is that of expropriation of a foreign investor's property by a host country. Excluded from coverage are "[m]easures normally taken by governments to regulate their economic activities such as taxation, environmental and labor legislation as well as normal measures for the maintenance of public safety." The provision "reflects a sensitivity to [developing/host countries] that may wish to regulate economic activity on a nondiscriminatory basis without being accused of engaging in 'creeping' expropriation." Thus, this exclusion is another incentive offered to Latin American countries in exchange for their ratification of the Convention. Again, this incentive may affect MIGA's ability to effectively protect a foreign investor. MIGA will not provide coverage for

194. Shihata, supra note 4, at 15.
195. MIGA Convention, supra note 3, art. 15.
196. Even more startling in light of claims on behalf of MIGA is the fact that "a member government may, if it wishes, limit its use of MIGA's services to the coverage of investments by its nationals in foreign member countries without necessarily allowing it to cover foreign investments in its own territory." Shihata, supra note 4, at 15-16.
197. MIGA Convention, supra note 3, art. 11.
198. The Convention contemplates this risk as "encompass[ing] measures attributable to the host government such as nationalization, confiscation, sequestration, seizure, attachment and freezing of assets." Commentary, supra note 98, ¶ 14.
199. Id.
200. Rowat, supra note 6, at 129.
expropriations which do not fit within the parameters of Article 11.\textsuperscript{201} This may leave the foreign investor uncompensated where a Latin American government can present its expropriation as being "non-discriminatory."

Another risk covered under Article 11 is "repudiation of government contracts where the investor has no access to a competent forum, faces unreasonable delays in a court of law or is unable to enforce a final judicial or arbitral decision in his favor."\textsuperscript{202} However, a foreign investor will not be covered until he or she exhausts local remedies or a given remedy is found to be unenforceable.\textsuperscript{203} This "exhaustion of local remedies" provision clearly will be attractive to Latin American countries considering becoming MIGA Member Countries. Indeed, Latin American governments which insert Calvo clauses into their contracts almost invariably require "exhaustion of local remedies."

This provision, however, is not as attractive to the foreign direct investor. Under Article 11, the investor will not receive coverage of his or her loss until local remedies are exhausted. This structure could mean a costly and time-consuming effort before the investor recoups any of his or her investment loss. It is hard to see then how MIGA's coverage improves a foreign investor's situation. Most foreign investors would prefer limiting or eliminating the need to litigate a claim through the host country's legal system. Thus, it is questionable (1) whether MIGA makes investing in Latin America any more attractive than before, and (2) whether MIGA makes investing in Latin America any less risky than before.

Conclusion

The Multilateral Investment Guarantee Agency was designed to spur foreign direct investment in less-developed countries by offering a framework of legal and economic protections. With regard to Latin American countries, MIGA's goal may be frustrated by their continued use of the Calvo Doctrine's national treatment standard and international arbitration prohibition principles.

The Calvo Doctrine, formulated in response to European and American diplomatic intervention in contractual disputes between their investors and Latin American states, continues to exert a strong influence on Latin American countries. The dependency theory view of Latin American economic development incorporates the Calvo Doctrine into its vision of how foreign investment should function in Latin American economies. The Charter of Economic Rights and Duties of States is also a powerful statement of Calvo principles by lesser-developed countries. Finally, one must only examine the constitutions and foreign investment laws of Latin American countries in general, and ANCOM members in particular, to see the

\textsuperscript{201} MIGA Convention, \textit{supra} note 3, art. 11.

\textsuperscript{202} Shihata, \textit{supra} note 4, at 14.

\textsuperscript{203} MIGA Convention, \textit{supra} note 3, art. 11(a)(iii).
continued influence of Calvo's national treatment standard and interna-
tional arbitration prohibitions.

The continued relevance of the Calvo Doctrine to Latin American investment laws raises serious questions about whether Latin American nations will become signatories to the MIGA Convention. Considering ANCOM member countries as a representative sample of Latin America, the answer can only be that many Latin American nations will not sign the Convention. Even if some Latin American countries do become signatories to the MIGA Convention, Calvo principles in their laws and in the MIGA Convention itself may keep MIGA from effectively meeting its goal of increasing foreign direct investment flows to Latin America. Most Latin American countries can be expected to condition their participation on such requirements as a foreign investor exhausting local remedies. A local remedies condition gives a foreign investor a very tenuous grasp of MIGA investment guarantee protection.

The Calvo Doctrine continues to thrive as a socio-political framework for how foreign investment should fit in Latin American countries. By concentrating solely on the economic situation of Latin America, MIGA has undervalued and misused the Calvo Doctrine to its peril. Unless MIGA effectively addresses these issues, its prospects in Latin America are dim.